Editor's note: appealed -- remanded, Civ.No. 80-0231 A (D.Utah Sept. 3, 1982); Vacated on judicial remand -- See George Val Snow (On Judicial Remand), 79 IBLA 261 (March 7, 1984)

GEORGE VAL SNOW

IBLA 79-520 Decided February 29, 1980

Appeal from decision rejecting an application to amend homestead patent No. 1077267.

Affirmed.

1. Conveyances: Generally -- Equitable Adjudication: Generally -- Patents of Public Lands: Amendments

   Where over the course of several decades patented land has been conveyed according to the description in the patent by willing buyers and sellers in "arm's length" transactions, the subsequent grantees of the original entrymen had a duty to identify the land that they were purchasing, and the government will not amend the patent to substitute other public land simply because the present owner believes, or even proves, that certain of the land settled by the original entryman was misdescribed by him, absent any showing of a basis for equitable relief.

APPEARANCES: Jack L. Schoenals, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In 1927 one Peter Madsen filed a homestead application in the Salt Lake City land office. After an amendment of the land description and various procedural machinations, he had apparently perfected his entry, and on September 8, 1933, he published his first notice of intention to make final proof for the E 1/2 NW 1/4, NW 1/4 NE 1/4, Lot 2 of sec. 19, T. 30 S., R. 1 W., Salt Lake meridian. By patent No. 1077267, dated August 6, 1935, Madsen received title to the above-described land, which comprised 140.66 acres.

In October 1978, George Val Snow, asserting that he is the present owner of this land, applied to the Utah State Office of the Bureau of Land Management (BLM) for an amendment of the Madsen patent. It is Snow's contention that a mistake was made, either by Madsen or someone in the land office, so that the land patented to Madsen was different in major portion than the land actually entered and occupied by Madsen as his homestead. Snow asserts that Madsen's patent should have described the S 1/2 SE 1/4 NW 1/4, SW 1/4 NE 1/4, NE 1/4 SW 1/4, N 1/2 NW 1/4 SE 1/4, Lot 3 in sec. 19. In support of this contention, Snow has presented arguments and evidence which tend to show that he may be correct.

BLM has attempted to review Madsen's homestead records, which were housed in the Archives, but they have been lost. The only official record of Madsen's occupancy and eventual ownership is the serial record page, the Tract Book entry, the published notice of his intention to make final proof, and the patent itself. All these describe the same land -- the land which was conveyed to him by the patent.

Moreover, according to Snow, one of the subdivisions actually occupied by Madsen, which Snow now seeks to have included in the patent, contains a live spring. However, by Exec. Order No. 107, dated April 17, 1926, every smallest legal subdivision of the public land surveys which contains a spring or waterhole was withdrawn from settlement, location, sale or entry, and reserved for public use and benefit in accordance with the provisions of section 10 of the Act of December 29, 1916, 43 U.S.C. § 300 (1976); 43 CFR 2311.0-3. Since Exec. Order No. 107 was issued more than a year and a half prior to Madsen's application and the allowance of his entry, it is likely that this particular subdivision was unavailable to be settled as homestead and both Madsen and the land office personnel knew this at the time. The serial register page reflects that Madsen submitted an "affidavit as to springs" to the land office on August 31, 1928, which the land office noted was "insufficient." This may have been intended by Madsen to show that there were no springs on the land he had entered, so as to demonstrate that his entry was not barred by Exec. Order No. 107 (which would indicate that his entry was properly described), or it may have been intended to show that the spring on the land he had settled was not within the ambit of the order (which would support appellant's contention). What the affidavit said, why it was "insufficient," and how the insufficiency was resolved, is purely a matter for conjecture.

On the basis of its inability to find that the description in the patent actually was in error, and on the basis that the grantee of patented land "takes according to the survey on the ground," BLM rejected the application to amend the patent to include the Federal land desired by Snow.

From that decision Snow has brought this appeal.

[1] We are of the opinion that insofar as Snow's application is concerned, it is irrelevant whether or not Peter Madsen's patent describes exactly the land he homesteaded, or if he constructed improvements on land not included in the entry as allowed. There is no demonstrated privity of interest between Madsen and Snow. Snow has never submitted his deed to the patented land, and this record contains no abstract of title to the property. However, counsel for Snow has filed the affidavit of Benjamin L. Mathews, who was acquainted with Peter Madsen and with the subsequent history of the subject property. One paragraph of Mathews' affidavit reads: "[Madsen] sold the property to Mr. Herbert Gleave in 1939. Mr. Gleave sold it to Alma Savage in about 1942. G. Val Snow, son-in-law of Alma Savage purchased this property in 1978."

What this account portrays is a series of transactions by people who were purchasing described land, and who had no demonstrable right to acquire anything else that might have been earned by Peter Madsen. The land which was patented, and presumably described in the successive deeds to Gleave, Savage, and Snow, was surveyed and readily identifiable. 1/

There is no showing of any equitable basis to award the appellant different -- and better -- land than he and his predecessor grantees contracted to buy. If appellant failed to take the measures necessary to assure himself that the land he was purchasing is the land he intended to buy, the Federal Government cannot stand as the warrantor of his expectations. It is noteworthy that appellant filed his application to amend the patent in 1978 -- the same year he reportedly purchased the land described in the patent. Thus, it appears that he could have easily discovered the discrepancy, if any, before he purchased the land.

While Snow's purchase from his mother-in-law may or may not have been an "arms length" transaction, there is nothing to indicate that her purchase from Gleave, and Gleave's purchase from Madsen were attended by any circumstances which would distinguish them from routine conveyances between willing buyers and sellers of certainly-described lands.

Were this a case where the homesteader himself were able to show that through error he had not been granted what he had earned, or if the homesteader's heirs had been born and reared and remained on the family homestead, only to discover that it had been misdescribed in the patent, a case might be made for amendment pursuant to section

1/ Snow speculates that in describing the land he may have been confused by the "old" 1899 survey corner markers and the "new" survey done during 1921-23 and approved in 1924. Any confusion which may have been so engendered in 1927 surely must have been dissipated by the times of the subsequent private conveyances.

316 of the Federal Land Policy and Management Act of 1976; 43 U.S.C. § 1746 (1976). See Rowland Oswald, 35 IBLA 79, 86-88 (1978). Perhaps even a remote transferee who, in good faith and in the exercise of reasonable diligence, had invested substantially in improving the property, or had paid a purchase price based on the value of the improvements in place, could show that he was deserving of relief.

But where, as here, the applicant has no equitable stake in the efforts of the homestead entryman and has no equitable interest in the land applied for, but is only the most recent of a succession of purchasers of the patented land over a period of several decades, no relief properly can be afforded.

The statute, supra, provides that the Secretary may correct patents, thereby investing him (and those who are delegated to act for him) with discretion in the matter. Before such discretion can be exercised it must clearly appear that an error was, in fact, made. Otherwise, an application to amend would be barred as a matter of law. Once the fact of error in the patent is established, the other circumstances of the case must be examined to determine whether considerations of equity and justice warrant amendment of the patent.

In this instance we are hampered in determining whether the description in the patent is accurate by the loss of records pertaining to the Madsen entry. Conceivably, those records might yet turn up and resolve that issue. But in this case there is no need to make the resolution of the appeal contingent on a finding of patent error. Appellant has invested nothing in the improvement of the lands sought. His purchase price could not have been based to any degree on the value of existing improvements on those lands, as they are in ruin and worthless. He obviously has not paid taxes on the Federal land he seeks to acquire. He has no claim, as an heir or lienholder, to what Madsen earned, but only to the land that Madsen sold and he eventually purchased through mesne conveyances. If he believed that he was acquiring the land he now seeks, he certainly failed to exercise due diligence to identify the land prior to purchase, as is the responsibility of any purchaser of real property. In short, he has no equitable claim or interest in the land applied for, and his application was properly rejected on that ground alone.

Therefore, pursuant to he authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I agree with the result reached in the majority decision, my concurrence is primarily occasioned by the failure of appellant to clearly demonstrate that an error, either by the original entryman or the Government, occurred in describing the land which was originally patented. Appellant contends, in effect, that Peter Madsen, the original entryman and patentee, based his description of the land sought on the section corners established by the 1899 survey of T. 30 S., R. 2 W., Salt Lake meridian. Specifically, appellant contends that the 1899 survey established the common corner for secs. 13 and 24, T. 30 S., R. 2 W., and secs. 18 and 19, T. 30 S., R. 1 W. Appellant further contends that a projection of the section line east from the common corner would result in description of the Madsen homestead over the very land appellant contends Madsen sought.

There are, however, a number of difficulties intrinsic to this analysis. First of all, it ignores the fact that in 1922 the west boundary of T. 30 S., R. 1 W., was resurveyed, and a new section corner for secs. 18 and 19 was established. This section corner was identified by an iron post with a brass cap (in contradistinction to the 1899 survey which had identified sections corners by marked rocks). This survey was officially approved on December 12, 1923, almost 4 years prior to Madsen's entry application. Therefore, the correct corners were clearly evidenced on the ground at the time that Madsen made his entry.

In order to counter this argument, appellant now contends that "[t]he file reflects that Peter Madsen had entered into possession of the property several years before he filed his application for the patent and the only reasonable conclusion which can be drawn from the file is that he entered into possession of the property before the survey of Township No. 3 Range 1 West had been completed and made public." Examination of the record, however, generates no support for appellant's contention. The file contains an affidavit of one Benjamin L. Mathews, who had been the notary public for Madsen's final proof. Contrary to appellant's argument, this affidavit states: "Peter Madsen lived and worked at the 'Little Meadow Property Homestead' several years prior to filing. I believe about 1925 or 1926. Peter Madsen worked his property and also worked for Herbert Gleave in Antimony, approximately 6 miles away." It is, of course, obvious that this document would place the commencement of Madsen's occupancy from 2 to 3 years after the resurvey.

Moreover, the field notes of the 1922 resurvey indicate that the only occupant in T. 30 S., R. 1 W., was a settler in the SE 1/4 SE 1/4 sec. 7. Finally, if appellant had been occupying and working this property prior to 1923, he would have been able to apply for the patent when he made the original entry. As the Department noted in Suggestions to Homesteaders and Persons Desiring to Make Homestead

Entries, 48 L.D. 389 (1922), an entryman "may have credit for residence as well as cultivation before the date of entry if the land was, during the period in question, subject to appropriation by him." Id. at 397. See also Moore v. Northern Pacific Ry. Co., 43 L.D. 173, 175 (1914). Final proof was not filed until October 19, 1933, 5 years after the allowance of the entry. There is no support in the documents in the file for appellant's contention that Madsen was in occupancy of the land prior to the 1922 resurvey.

Appellant also contends that the exclusion of the spring from the land patented shows clearly that Madsen misdescribed the lands which he sought. As the majority decision notes, appellant places special emphasis on the notation on the serial page that the affidavit as to springs was "insufficient." As the majority points out, this notation is, at best, ambiguous. The serial page makes reference to Circular 1066, which was published at 51 L.D. 457 (1926). That Circular required an "affidavit" in connection with every selection, filing, or entry made on or after April 17, 1926, to the effect that either "no spring or water hole exist * * * upon any legal subdivision of the land sought to be appropriated," or "[i]f there be any spring or water hole * * * the exact location and size thereof, together with an estimate of the quantity of water in gallons, which it is capable of producing daily, and any other information necessary to determine whether or not it is valuable or necessary as a public water reserve." Id. at 458.

It should be noted that the original decision of the State Office, rendered on March 16, 1979, erroneously concluded that if the land sought by Madsen had contained a spring it would have been withdrawn from entry by Exec. Order No. 107 of April 17, 1926. That Executive Order did not withdraw all springs and water holes found on the public domain, but rather applied only to such springs and water holes "capable of providing enough water for general use for watering purposes." Circular No. 1066, 51 L.D. at 457. Thus, the mere existence of a spring would not necessarily prevent the selection of the land. Nevertheless, as the majority decision points out, it is impossible at this time to determine the exact nature of the affidavit or its deficiency, i.e., whether it improperly described the land or whether it insufficiently established that the spring was incapable of general use for watering purposes.

Appellant also ignores the fact that even if Madsen had been misled by the 1899 survey, it is unlikely that officials of the General Land Office would have been similarly misled. The serial pages shows that final certificate was withheld pending a field investigation. The field investigation took place between October 19 and November 2, 1933. It seems reasonable to assume that the field investigator would have checked to determine that the land appellant sought conformed to the 1922 resurvey.

Finally, what appellant has not explained is how, assuming that Madsen had based his entry on the 1899 survey, the shape of the land

sought would have changed. As is obvious from the maps submitted by appellant, he seeks not only to have the situs of the description changed, he also seeks to have the configuration of the lands patented altered.

While recognizing that the patent file, which might have aided appellant in his position, has been lost, I am still constrained to hold that appellant has not met the burden of establishing that an error, did, in fact, occur. Amendments of patents are extraordinary actions, and those who seek such a remedy must establish that an error did occur. Appellant has simply not met his burden herein. I, therefore, concur in the denial of this appeal.

James L. Burski
Administrative Judge